No. 02-

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 2002

JEROME A. MAHER and JOHN R. GRAVEE

Petitioners,

vs.

UNITED STATES

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

I

When a judge's impartiality is raised a reviewing court should rule on the issue.

II

Did the Court of Appeals use the wrong standard for review of Petitioners Complaint instead of what notice pleading requires.

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OPINIONS BELOW

The United States Court of Federal Claims decision dismissing Petitioners for failure to state a claim upon which relief could be granted is reported in Maher v. United States 48 Fed. CL. 585 (2001).

The United States Court of Appeals for the Federal Circuit decision affirming the Court of Federal Claims is reported in Maher v. United States 314 Fed. Rep. 3rd 600 (Fed. Cir. 2002).

JURISDICTION

Petitioners, Jerome Maher and John Gravee, invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari under the authority of 28 U.S.C. § 1254. The decision of the Court of Appeals for the Federal Circuit was filed on December 19, 2002.

STATUTES INVOLVED

Notice Pleading required under Federal Rules of Civil Procedure Rules 1 and 8 and Rules 1 and 8 of the rules of U.S. Court of Federal Claims bias under 28 U.S. 6A § 455.

STATEMENT OF THE CASE

The instant Federal Savings and Loan Insurance Corporation case is a Winstar type case, US v. Winstar Corp. 518 US. 839 (1996), where it was stated at P850.

> "FSLIC had insufficient funds to make up the difference between a failed thrift's liabilities and assets, the Bank Board had to offer a "cash substitute" to induce a healthy thrift to assume a failed thrift's obligation."

Goodwill recognized... as the result of an FSLIC sponsored supervisory merger was referred to as supervisory goodwill."

> "... thrift regulators let the acquiring institutions count supervisory goodwill toward their reserve requirements under 12CFR§563, 13 (1981)... in most cases the institution resulting from the transaction would immediately have been insolvent under federal standards of goodwill had not counted toward regulatory network" US v. Winstar 518 U at 850.

Regulators let acquiring institutions amortize this goodwill asset over up to forty years.

In 1982, the Federal Home Loan Bank Board contacted First Federal Savings and Loan Association of Wilmette, requesting that the institution merge with three

failing thrifts. First Federal was very strong financially at the time; the other three institutions were very weak and near closure. After extensive negotiations and planning with Federal Home Loan Bank officials, First Federal merged with the other institutions to form Horizon Federal Savings and Loan Association (HSB).

At that time and long prior to 1982 and thereafter Petitioners, Jerome Maher and John Gravee, were the top officers of First Federal of Wilmette and the resulting institution, Horizon Federal, after the merger and their Boards of Directors, as Vice President and Vice Chairman of the Board of Directors and Chief Financial Officers, and President, Chief Executive Officer and Chairman of the Board of Directors.

Maher and Gravee were the chief negotiators with the FHLBB in consummating the merger agreement and conducted the negotiations personally vis-à-vis with the federal government agency representatives. One of the government's required merger terms was that Maher and Gravee were required to relinquish their pension plans which had been previously established with First Federal of Wilmette, on the express understanding that as soon as the merged institution was financially stable another plan more suitable and like the one in place prior to merger would be established for Maher and Gravee and other lower management. The merger plan also required Maher and Gravee to continue in their top official positions.

In 1985, when it began again to show a profit, Horizon created a deferred compensation trust for Petitioners. The requirement that a deferred compensation

trust be created was part of plaintiffs' 1985 employment contract with Horizon. The employment contract included other usual components of salary, insurance and other benefits, all of which are the subject of Count IV of the instant complaint.

The 1985 Deferred Compensation Trust was a "Rabbi Trust." A Rabbi Trust is one in which the principal of the trust remains a part of the general assets of the corporation and is reachable by creditors.

In 1987 the Petitioners and Horizon entered another employment contract containing the usual terms of salary, benefits and also a provision requiring Horizon to create a deferred compensation trust in the form of a "Secular Trust" whereby an independent trustee (Harris Bank) would be the trustee of the corpus which would be outside the control of the settlor (i.e., Horizon), and not reachable by creditors of Horizon. Creation of such agreements were industry practice.

The employment contracts and the deferred compensation trust created pursuant thereto were reviewed by the regulatory agency pursuant to the terms of those regulations.

In 1987, the date of Petitioners most recent employment contract, Horizon was not only solvent, but well within contemporaneous regulatory supervisory requirements pursuant to the inducements offered in 1982 to it, including "goodwill" amortization over a period of forty (40) years, all of which was part of the package

offered by FHLBB to induce the merger and thus form the newly created Horizon Federal.

Congress passed FIRREA in August 1989 which pulled the rug out from under HSB and numerous other institutions which had been formed as a result of the government's request to merge failing institutions with healthy institutions. That legislation and regulations pursuant thereto withdrew the inducement benefits previously enumerated.

In December, 1989, the government by regulation demanded that Horizon furnish a plan showing how it would become and remain a healthy institution financially. However, before the Horizon could respond to the government's demand, Horizon was seized on January 11, 1990 placing it in conservatorship under the RTC. Maher and Gravee were reemployed by the RTC acting as conservator.

On February 28, 1990, Maher and Gravee demanded that Harris pay to them the principal proceeds of the deferred compensation thrust in accordance with its terms, namely, that the principal proceeds be paid to the beneficiaries in the event the institution ceased to exist. In March 1990 the RTC (Resolution Trust Corporation) wrote to Harris Bank demanding that the proceeds of the trusts not be paid to Maher and Gravee. Harris Bank withheld payment. On April 12, 1990, Maher and Gravee filed claims with the RTC pursuant to the terms of FIRREA 1281(d). RTC never to date ruled on their employment benefit claims. These claims were appended to Petitioners' Brief in the Court of Appeals.

The RTC by letter dated June 28, 1990, terminated Maher's and Gravee's employment on the grounds that there had been a reduction in force, not for cause.

Petitioners filed a contract claim for employment benefits, such as pensions and bonuses arising out of their long time employment as top official with Wilmette Federal and the merged S & L, Horizon Federal, before its take over by the Reconstruction Trust (RTC). Petitioner's contract claim was filed as a Counterclaim in RTC v. Gravee et al 94 C 4589 in the Federal District Court for the Northern District Court of Illinois. That District Court transferred Petitioners' contract claims to the United States Court of Federal Claims.

The Federal Home Loan Bank by its President and Vice President required Maher and Gravee to remain as the top officials of the newly created S&L (Horizon Federal) and give up their employment contract pension rights. Maher and Gravee were given assurances by the President and Vice-President of the Federal Home Loan Bank who handled the merger for the Federal Government, and relied upon these assurances that more favorable pension and benefit plans would be restored as soon as the new institution (Horizon Federal), as merged, became more stable financially.

Subsequent to the merger in 1982 when Horizon became financially more stable Maher and Gravee's contract employment benefits were restored as their employment contracts were resigned and renewed. First

Petitioners in 1985 were given a "Rabbi" trust for their benefits. Later they were given as "Secular" trust for their benefits which made Harris Bank the trustee and put the trust proceeds out of the reach of Horizon's creditors. Other employers of Horizon also were given benefit packages. Only Maher and Gravee's were never honored. Indeed the Government has never claimed that any creditor or depositor went unpaid except Maher and Gravee.

All of Petitioners employment contracts with Horizon were routinely reviewed by Federal Regulators at least annually during Business Plan submissions and approval, audits, and inspections.

On August 8, 1989 Congress enacted the financial Reform, Recovery and Enforcement Act of 1989. Pub. 2. No 101-73, 103 STAT. 183 (FIRREA) which prohibited the use of supervisory goodwill as an asset to satisfy capital requirements. Horizon unable to meet the new capital requirements was seized Jan. 11, 1990. Notice to all S&L's that they could no longer use Supervisory Goodwill as an asset was dated January 9, 1990 in the Office of Thrift Supervisor" (OTS) Thrift Bulletin No. 38-2. Maher and Gravee's claim which had to be filed within 6 years of the Government's breach met this requirement because it was filed in the U.S. District Court in its Counterclaim in October 1995 within 6 years after Horizon's seizure, the notice of the Thrift Bulletin cited above and within six years after OTS enacted its regulation in December 1989 prohibiting the use of Supervisory Goodwill.

REASONS FOR GRANTING THE WRIT

I

WHEN A JUDGE'S IMPARTIALITY IS RAISED A REVIEWING COURT SHOULD RULE ON THE ISSUE

Petitioners asserted in their Appellants Brief in the Federal Circuit the impartiality of the Judge in the Court of Claims.

On October 20, 2000 the case of Maher and Gravee, Petitioners herein, was sent to Judge Wiese by Senior Judge Loren Smith of the U.S. Court of Federal Claims, that order provided.

> "Pursuant to the Omnibus Case Management Order, the court extends the appointment of Judge John P. Wiese as Issue Judge to resolve the statute of limitations question in the five above captioned cases. Issue Judge Wiese shall utilize whatever procedures he deems appropriate in resolving the statute of limitations issue in these cases."

> "For administrative convenience, the five cases will be reassigned to Judge Wiese until such time as the statute of limitations issue is resolved. If the claims of some or all of the plaintiffs can still be maintained after resolution of this issue, the cases will, at that point, be governed by any relevant

generic *Winstar*-related orders in effect."
(Emphasis Added)

Judge Smith had been assigned as the managing judge for all Winstar cases.

The Omnibus Case Management Order provided in par. 2C that the managing Judge could assign specific matters or cases to a judge for resolution, that is "any issue common to a significant number of cases to another judge ('Issue Judge') (sic) "... and may assign cases to other Judges for trial...

The Omnibus Case Management Order further provided in Par. 6 that statute of limitation issues should be resolved before summary judgment proceedings and "These issues are to be resolved in all cases in which the issue is raised prior to any discovery in those cases." Id

Judge Wiese never even addressed the statute of limitations question but rather ruled on whether Petitioners stated a claim upon which relief can be granted and whether the Court of Federal Claims possessed jurisdiction.

On January 18, 2001, the day of the Court's hearing on the Government's Motion to Dismiss Appellant, John Gravee was present in the courtroom (Transcript P2). After indicating that Mr. Volini, (claimant's counsel) "... had not met with success" (Trans. P34) in his argument to defeat the Motion to Dismiss, Judge Wiess said to Petitioner, John Gravee, "We're at the end of the line now,

and I urge you not to go any further with this. Please do not authorize Mr. Volini to take an appeal. It will simply cost you more money, and the outcome is certain. You cannot prevail." Trans. P. 34 and 35. (Emphasis added) Camillo F. Volini was Petitioners' attorney throughout this controversy. He died about six weeks later on March 1, 2001 after surgery.

Appellants submit that at a minimum, instructing a claimant not to appeal the Judge's ruling dismissing Petitioners' claim creates "a reasonable factual basis for doubting the Judge's impartiality..." and in which event he should disqualify himself. Alexander v. Primerica Holdings, Inc., 10 F.3rd 155, 162. (3rd Cir. 1993). The Court in Primerica further held at P. 166 that, "... a judge's participation in a case must never reach to a point where it appears, or is even perceived to appear, that the judge is aligned with any party in the pending litigation." Yet Judge Wiess clearly aligned himself with the government at least insofar as deciding whether to appeal. The Court of Appeals failed to address this issue.

Canon 2 of the code of Conduct for the United States Judges tells Judges to avoid impropriety and the appearance of impropriety in all activities. Moreover, 28 USC Section 445(a) requires Judges to recuse themselves when their "impartiality might reasonable be questioned." The Judge's comment could be considered as not extrajudicial. It need not be extrajudicial. The Court in Primerica at P. 166 held "... we have never explicitly required a showing of extrajudicial bias or prejudice as a prerequisite for disqualification under Section 455(a)."

Loranger v. Stierheim, 10 F3d 766 (11th Cir. 1994) held that the fact that the Judge's remarks on rulings occurred in a judicial context does not necessarily insulate them from scrutiny.

It is provided at 28 USCA § 455:

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

This Court has held that Section 455 places the obligation to identify the existence of grounds for bias on the judge himself rather than requiring recusal only in response to a party's affidavit. Liteky U.S. 510 U.S. 540, 548 127 Led 2d 474, 114 S. Ct. 1147, 1153 (1994).

> Liteky also holds at P 548, 1154 that
> "what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever "impartiality might reasonably be questioned."

Telling a claimant in Court not to appeal the judge's ruling as Judge Wiese did at least deserves a ruling by the Federal Circuit or any Court of Appeal when raised on appeal.

In Nicodemus v. Chrysler Corp. 596 F.3rd 152 (6th Cir. 1979) the Court apply held:

"As the Eighth Circuit observed in Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976):

"A judge best serves the administration of justice by remaining detached from the conflict between the parties. As Justice McKenna stated long ago, '[T]ribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial…' Berger v. United States, 255 U.S. 22, 35-36, 41 S.Ct. 280, 235, 65 L.Ed. 481 (1921). When the judge joins sides, the public as well as the litigants become overawed, frightened and confused." 529 F.2d at 186.

When Judge Wiese told Petitioner, John Gravee, not to appeal he appeared to support the Government and a Court of Appeals should have ruled on the issue of his appearance of bias.

II

THE COURT OF APPEALS USED THE WRONG STANDARD FOR REVIEW OF PETITIONERS COMPLAINT INSTEAD OF WHAT NOTICE PLEADING REQUIRES

Rule 1 of the Rules of the Court of Federal Claims in effect when Judge Wiese ruled on the merits of Petitioner's claim in January of 2001 provided in sub par 1(b).

> "**(b) Federal Rules of Civil Procedure.** The Federal Rules applicable to civil actions tried by the court sitting without a jury and in effect on December 1, 1991, have been incorporated in these rules to the extent that they appropriately can be applied to proceedings in this court."

Par (a) of this Rule provides in part "(2) These rules shall be construed to secure the just, speedy and inexpensive determination of every claim." Rule 1 of the Federal Rules of Civil Procedure is identical to (a)(2) of the Court of Claims.

Rule 8 of the Federal Rules of Civil Procedure provides at (a)(2) "a short and plain statement of the claim showing that the pleader is entitled to relief. "This is identical to Rule 8(a)(2) of the Court of Federal Claims Rule 8(a)(2). In Scheur v. Rhodes 416 US 232 40 L Ed 2nd 90, 94 S Ct 1683 (1974) this Court held at P236, 1686 that:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a Recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (footnote omitted)."

During oral argument before the Court of Appeals, Maher and Gravee's attorney was asked who was the person who promised Petitioner's herein that they could get their employment benefits such as pensions when the new thrift was financially stable. The answer was "LEO BLABER" who was President of the Federal Home Loan Bank with whom they negotiated the merger, who required them to give up these benefits in order for the merger to go through, and who required Maher and Gravee to continue

as President and Vice President of the newly merged thrift, Horizon Federal.

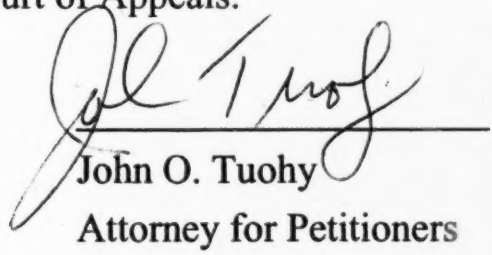
The same Government officials had the authority to negotiate the merger which has never been denied by the Government, it is for the trier of fact to determine if such official exceeded his or their authority.

All Petitioners need to do is satisfy the concept of notice pleading, and by the Case Management rule no discovery could be had until after Judge Wiese ruled on the Statute of Limitations which he didn't do.

Would Maher and Gravee sign on and agree to the merger if their employment benefits including severance pay were permanently denied? Of course not.

CONCLUSION

For the above stated reasons, petitioner prays that a writ of certiorari issue to the Court of Appeals and that this Court reverse the ruling of the Court of Appeals.



John O. Tuohy
Attorney for Petitioners

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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A ORDER OF U.S. COURT OF FEDERAL CLAIMS - JUDGE LOREN A. SMITH, MANAGING JUDGE OF WINSTAR TYPE CASES

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D OPINION U.S. COURT OF FEDERAL CLAIMS MAHER AND GRAVEE V. UNITED STATES

E OPINION MAHER AND GRAVEE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX A

* *	*	
DAVID H. VOSS,	*	
Plaintiff,	*	No. 97-372 C
	*,	
THE UNITED STATES,	*	
	*	
Defendant.	*	
* *		
* *	*	
JEROME A. MAHER and JOHN R. GRAVEE,	*	
	*	
Plaintiffs,	*	No. 98-61c
	*	
v.	*	Filed:
THE UNITED STATES,	**	
Defendant.	*	
* *		

ORDER

Pursuant to the Omnibus Case Management Order, the court extends the appointment of Judge John P. Wiese as Issue Judge to resolve the statute of limitations question in the five above-captioned cases. Issue Judge Wiese shall utilize whatever procedures he deems appropriate in resolving the statute of limitations issue in these cases.

For administrative convenience, the five cases will be reassigned to Judge Wiese until such time as the statute of limitations issue is resolved. If the claims of some or all of the plaintiffs can still be maintained after resolution of this issue, the cases will, at that point, be governed by any relevant generic *Winstar*-related orders in effect.

The Clerk of the Court is directed to file this order in the five above-captioned cases. In addition, the Clerk is directed to send the order to the members of the three Winstar coordinating committees representing the private plaintiffs, the plaintiff FDIC, and the defendant

LOREN A. SMITH, SENIOR JUDGE

APPENDIX B

In the United States Court of Federal Claims

PLAINTIFFS IN ALL WINSTAR-RELATED CASES AT THE COURT,	)	
Plaintiffs,	)	
	)	**Nos. 90-8**
C, et al.		
v.	)	**(Chief**
Judge Smith)		
THE UNITED STATES,	)	
Defendant.	)	

OMNIBUS CASE MANAGEMENT ORDER

Pursuant to the Rules 1, 16, 77 and 77.1 of the United States Court of Federal Claims, the Court ORDERS as follows:

1. Scope

a. This Order applies to all Winstar-related cases ("Winstar cases" or "cases"), including any claims, special pleas in fraud, defenses, affirmative defenses, setoffs, counterclaims, or any other issues raised in those cases, except that this Order does not apply to Glendale Federal Bank, FSB v. United States, No. 90-772C, or Statesman Holding Corp., et al. v. United States, No. 90-773C.

b. This Order is intended to supplement, and not to replace, any Rule of the United States Court of Federal Claims, except as inconsistent with this Order.

2. Administration

a. Reassignment of All Winstar Cases

In order to provide consistent treatment of all matters related to Winstar cases, to conserve the resources of the Court and the parties, and for the efficient administration of justice, all Winstar cases have been reassigned to Chief Judge Smith, who will serve as the Managing Judge.

b. Managing Judge

The Managing Judge will administer this Order and will be responsible for all matters relating to the management of Winstar cases, including, unless otherwise assigned, the resolution of procedural matters upon which the Coordinating Committees are unable to agree.

c. Issue Judges, Trial Judges, Discovery Judges and Special Masters

The Managing Judge may assign specific matters or cases to another Judge or Judges of this Court for resolution. For example, the Managing Judge may assign any issue common to a significant number of cases to another Judge ("Issue Judge"). The Issue Judges will allow all interested parties to participate in the resolution of common issues and will set the briefing and oral argument schedules. Additionally, the Managing Judge may assign cases to other Judges ("Trial Judges") for trial. The Managing Judge also may assign discovery issues to a "Discovery Judge" or to a special master.

d. Status Conferences

The Managing Judge may schedule status conferences as necessary with the parties' Coordinating Committees. These status conferences will be open to the public and on the record.

e. **Certain Pretrial Procedures Suspended**

The requirements for Early Meeting of Counsel and for Joint Preliminary Status Reports set forth in Appendix G of the Rules are suspended for all Winstar cases.

3. **Organization of the Parties**

a. **Plaintiffs**

i. The plaintiffs will designate three attorneys to serve as a Plaintiffs' Coordinating Committee. The members of the Plaintiffs' Coordinating Committee will serve as primary spokespersons for plaintiffs on matters relating to the administration of Winstar Cases. The Plaintiffs' Coordinating Committee will have the authority to bind all plaintiffs with respect to procedural matters concerning pleadings, motions, discovery, trials, and related scheduling. In situations where the Committee is unable to speak on behalf of all plaintiffs, the Committee may speak to the Court on behalf of the plaintiffs who agree with the Committee's position. In these situations, the Court will provide an opportunity for other plaintiffs to present their differing views to the Court.

ii. Communications among plaintiffs' counsel (except communications with the Federal Deposit Insurance Corporation, to the extent that it is or may seek to participate as a plaintiff ("FDIC as receiver")), will be protected by a joint attorney-client privilege.

iii The FDIC as receiver, to the extent that it is or may seek to participate as a plaintiff in any Winstar case, will designate one or more attorneys to represent it in all proceedings.

b. **Defendant**

The defendant will designate three attorneys to serve as a Defendant's Coordinating Committee. The Defendant's Coordinating Committee will have the authority to bind the defendant with respect to procedural matters concerning pleadings, motions, discovery, and related scheduling, except to the extent that any governmental entity is or may seek to participate as a plaintiff.

c. **Functions of Coordinating Committees**

The Coordinating Committees will develop and implement a Master Litigation Plan, which will include a comprehensive discovery plan and will address such matters as the resolution of common issues, dispositive motions, and trials. Any counsel for any plaintiff or their assistants or staff, and any counsel for the defendant or their assistants or staff, may attend joint meetings of the Plaintiffs' and Defendant's Coordinating Committees; however, the Coordinating Committees (and representatives of the FDIC as receiver) will be the principal spokespersons for the plaintiffs and defendant.

4. **Initial Discovery**

a. **Exchange of Core Documents**

i. Within two weeks of the date of entry of this Order, the parties will exchange "core documents", as defined below. If a Master Protective Order has not been entered by that date, the exchange of core documents shall occur within two business days of the entry of that order.

ii. The defendant's core documents consist of case-specific "board packages," "closing books," and assistance agreements that the defendant has gathered to date.

iii. A plaintiff's core documents consist of all documents, in plaintiff's possession to date, that each plaintiff contends constitute

the contract(s) in its case, together with all modifications to the alleged contract(s), whether or not these have been previously supplied to the defendant.

iv. Each party will certify that it has made a diligent search for the core documents in its custody or control and will produce that certification along with its core documents. If a party believes that some or all core documents are in the custody or control of third parties, the certification shall so indicate.

v. In case involving institutions placed in receivership or conservatorship, the parties shall also serve the core documents and certification on FDIC as receiver.

vi. In any cases in which defendant moves to dismiss on grounds of the statue of limitations, a plaintiff may notify the defendant within ten days of the entry of this Order that it will not file a motion for summary judgment until after the motion to dismiss is resolved. In such a case, neither party shall be required to serve core documents on any other party or on FDIC as receiver until two weeks after the motion to dismiss is denied.

b. <u>Exchange of Document Indices</u>

i. No later than September 26, 1996, counsel for the parties will exchange all available existing indices of documents, or of boxes of documents, that may be relevant to each case.

If a Master Protective Order has not been entered by that date, the exchange of indices shall occur within five days of the entry of that order.

ii. Each party will certify that it has made a diligent search for all indices within its custody or control and will produce that certification along with the indices.

5. **Initial Determinations Regarding Liability**

a. Following the exchange of core documents, any plaintiff may file a motion for partial summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims, regarding two liability-related issues only: (1) whether a contract(s) existed in each case; and

(2) whether the Government acted inconsistently with that contract(s). Any plaintiff may utilize a

so-called "short form" format substantially similar to the sample attached to this Order as Appendix A. In any event, neither party shall be required to submit the "Proposed Findings of Uncontroverted Fact" or the "Statement of Genuine Issues" identified in Rule 56(d).

b. The defendant will respond within 60 days with respect to those two issues, except that the defendant need not respond to motions filed in cases in which (1) the defendant has filed a motion to dismiss on grounds of the statute of limitations, or (2) the FDIC as receiver has moved to intervene and take control of the case. In these cases, the defendant shall respond according to the schedule set forth below in § 5(e). The defendant need not identify any defenses of any kind, counterclaims, setoffs, pleas in fraud, etc. ("defenses") in responding to the motions, and the failure to assert those defenses in its response will not constitute a waiver. Any common issues identified in the defendant's responses shall be resolved in a manner similar to resolution of the issues identified in Paragraph 6 below.

c. The defendant shall not file an answer to the complaint in any case, and no defenses or arguments of any kind shall be deemed waived by reason of the defendant's not having filed an answer to any complaint. In addition, no allegation shall be deemed admitted, nor shall defendant be estopped from denying any allegation, by reason of

not having filed an answer to any complaint. No plaintiff shall file an answer to any counterclaim or plea in fraud, and no defense to any counterclaim or plea in fraud, nor any argument of any kind, shall be deemed waived by reason of the plaintiffs not having filed an answer to a counterclaim or plea in fraud. In addition, no allegation shall be deemed admitted, nor shall a plaintiff be estopped from denying any allegation, by reason of that plaintiffs not having filed an answer to a counterclaim or plea in fraud.

d. Within 120 days of the filing of a motion for partial summary judgment, except as set forth in § 5(e), the defendant shall set forth, in accordance with the requirements of the rules of this Court, any defenses of which it knows or has reason to know that relate to the two issues asserted in the motion. The Coordinating Committees will attempt to agree upon further procedures to resolve any defenses asserted, including any necessary discovery and farther motions or cross-motions. If the Committees are unable to agree, they will submit their respective proposals to the Managing Judge for resolution. Any issues or defenses not identified at that time will be addressed in accordance with the Rules of the Court or pursuant to the alternative procedures agreed upon by the Coordinating Committees or ordered by the Court.

e. In cases in which (1) the defendant has filed a motion to dismiss on grounds of the statute of limitations, or (2) the FDIC has moved to intervene and take control of the case as receiver, the defendant shall file its response to the motion for partial summary judgment within 30 days of denial of such motion. This response shall include the matters addressed in § 5(b) and § 5(d) of this Order.

f. The Coordinating Committees will attempt to agree upon procedures applicable to any case in which a party asserts a need to

take discovery in order to file or oppose a motion for partial summary judgment regarding the two issues identified above. If the Coordinating Committees are unable to reach agreement, they may submit separate proposals to the Managing Judge for resolution.

6. Resolution of Common Issues

The parties agree that the following issues are common issues requiring prompt resolution before summary judgment proceedings are resolved with respect to affected cases: (l) statute of limitations; and (2) FDIC standing as receiver. These issues are to be resolved in all cases in which the issue is raised prior to any discovery in those cases, other than the exchange of core documents, in accordance with procedures set forth in Appendix B (for statute of limitations) and Appendix C (for FDIC standing). The Managing Judge may assign these cases to Issue Judges for prompt resolution. The FDIC as receiver may participate in the resolution of an issue if that issue is raised in any case in which the FDIC as receiver may assert an interest. The Coordinating Committees will meet promptly to identify cases that raise these common issues and to advise the Court of these. The Coordinating Committees shall also meet to prepare procedures for resolution of other common issues, including other standing issues, issues identified in the defendant's responses to motions for partial summary judgment, and any other common issues.

7. **Master Litigation Plan**

a. The Coordinating Committees will attempt to agree by October 1, 1996, upon a Master Litigation Plan to govern all further proceedings. The Master Litigation Plan, which may be in phases, will include procedures for resolving common issues (other than the common issues covered by this Order), dispositive motions, trials, discovery schedules, protocols for depositions, document production, expert witnesses, document numbering systems, joint or uniform discovery requests from plaintiffs, master protective order, and other matters. The cases listed in Appendix D to this Order shall be accorded priority in the scheduling of cases for trial. The first of these trials shall begin four months after completion of trials in Glendale and Statesman, and trials shall continue thereafter until all cases are resolved. If the Committees are unable to reach agreement concerning a Master Litigation Plan, they may submit separate proposals by October 4, 1996, and the Managing Judge will adopt a plan.

b. In developing a Master Litigation Plan, the parties agree to be guided by the following principles regarding discovery:

i. The parties will coordinate discovery requests to the maximum extent possible to reduce the burden and expense imposed upon any party or witness.

ii. The Coordinating Committees will mutually prioritize cases for case-specific discovery. Discovery regarding liability issues (except as provided in part 4 above) for any case will not proceed until after the later of (1) the entry of a Master Litigation Plan; and (2) the resolution of the statute of limitations and standing-related common issues for that case. Discovery regarding damages issues for any case will not proceed until after the later of (1) the entry of a Master Litigation Plan, or (2) the completion of

trials in Glendale and Statesman, but in no event later than March 1, 1997.

iii. A Master Protective Order will be entered for all cases, which provides, among other terms, for the non-waiver of privilege and the protection of confidential information.

September 18, 1996

Loren A. Smith
Chief Judge

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEROME A. MAHER and JOHN R. GRAVEE,	)	
	)	
Petitioners,	)	
v.	)	
	)	**No. 98-61**
C		
THE UNITED STATES,	)	
	)	
Respondents.	)	

AMENDED COMPLAINT

NOW COME the Petitioners, JOHN R. GRAVEE and JEROME A. MAIER, by and through their attorney, CAMILLO F. VOLTNI, and hereby assert the following claims, and complain of the Respondents, THE UNITED STATES, by RESOLUTION TRUST CORPORATION (hereinafter "RTC"), OFFICE OF THRIFT SUPERVISION (hereinafter "OTS"), in its own capacity and as the successor to the FEDERAL HOME

LOAN BANK BOARD (hereinafter "FHLBB"), and the FEDERAL DEPOSIT INSURANCE CORPORATION (hereinafter "FDIC"), in its capacity as successor to the FEDERAL SAVINGS & LOAN INSURANCE CORPORATION (hereinafter ("FSLIC") as follows:

COUNT I
Breach of Contract

1. Petitioners bring these claims as claims for money damages, for recoupment or, alternatively, as claims against the Respondents as agencies of the United States.

2. This court has subject matter jurisdiction over these claims pursuant to 12 U.S.C., Sec. 1821. This case is the same and similar to the ***Winstar*** and ***Glenfed*** cases recently decided by this Court.

3. Petitioners are former directors of Horizon Federal Savings Bank (hereinafter "HORIZON") and are former employees.

4. Until 1982, Horizon (formerly known as First Federal Savings and Loan Association of Wilmette) operated as a highly successful and profitable savings and loan institution. During that time, Petitioners were members of Horizon's Board of Directors. In early 1982, Horizon was approached by officials of the FHLBB and FSLIC to request that Horizon agree to merge with Glenview Guaranty Savings & Loan Association, then located in Glenview, Illinois, with Evergreen Savings & Loan Association, then located in Evergreen Park, Illinois, and with Lincoln Square Federal Savings & Loan Association, then located in Chicago, Illinois. At that time, Glenview Guaranty, Evergreen Savings and Lincoln Square all were experiencing financial difficulties, were insolvent and would cease to operate unless they merged with a more successful savings and loan institution like Horizon. The FHLBB thus hoped that through a merger with Horizon those institutions would begin to experience positive growth.

5. In order to induce Horizon and its Board of Directors, including Petitioners, to approve the merger of Horizon with Glenview Guarantee, Evergreen Savings and Lincoln Square, FHLBB and FSLIC agreed to grant Horizon certain specific forbearances and assurances for a period of not less than 5 years, and also agreed that the supervisory goodwill created by virtue of

the merger could be used by the newly-created institution as an asset to satisfy its capital requirements. FHLBB further agreed that said supervisory goodwill could be amortized by the newly-formed institution over a period of 40 years.

6. In particular, to induce Petitioners to agree to the proposed merger FHLBB and FSLIC accepted Horizon's merger application and agreed, as a condition in the approval by Horizon and its Board of Directors of the merger with Glenview Guaranty, Evergreen Savings, and Lincoln Square, that the newly-merged institution would be granted the following forbearances and assurances for a period of not less than 5 years, subject to quarterly reports to be submitted by Horizon to the local Principal Supervisory Agent of the FHLBB:

a. A waiver of Horizon's net worth requirements by FHLBB;

b. A waiver of Horizon's liquidity requirements by FHLBB;

c. An agreement by FSLIC to issue Income Capital Certificates when requested by Horizon if necessary to meet Horizon's regulatory capital requirements, to ensure public confidence in Horizon, to meet Horizon's borrowing requirements or to satisfy accepted accounting standards; and

d. An agreement by FHLBB and FSLIC that Horizon would be permitted to elect to benefit from any newly-authorized regulations or laws relating to savings and loan institutions.

7. In addition, FHLBB and FSLIC specifically agreed to the conditions contained in the merger application which required that Horizon be permitted to utilize supervisory goodwill to satisfy its capital requirements and be permitted to amortize that goodwill over a 40-year period.

8. On the basis of the promises by Respondents set forth above, the Merger Agreements were entered into on March 5, 1982 (Glenview Guaranty), March 30, 1982 (Evergreen Savings), and March 23, 1982 (Lincoln Square Savings).

9. As a condition of the merger of Horizon with Glenview Guaranty, Evergreen Savings and Lincoln Square Savings, Horizon and FHLBB appointed Thomas P. O'Boyle to serve on Horizon's Board of Directors as a representative of the FHLBB.

10. At the time of the proposed merger, Glenview Guarantee, Evergreen Savings and Lincoln Square Savings were insolvent. Without the use of supervisory goodwill as an asset, the newly-merged institution would have been insolvent at the time of the merger.

11. On or about November 5, 1982, and in direct reliance upon the contractual promises by Respondents set forth above, Petitioners each voted to finally approve the merger of Horizon with Glenview Guaranty, Evergreen Savings and Lincoln Square Savings. Shortly thereafter, the mergers were carried out.

12. Petitioners each were intended beneficiaries of Respondents' contractual agreement with Horizon to recognize Horizon's supervisory goodwill for a period of 40 years. Respondents also acted expressly for the purpose of inducing

Petitioners to approve the merger of Horizon with Glenview Guaranty, Evergreen Savings and Lincoln Square Savings, and to induce Petitioners, Gravee and Maher to agree to enter into employment contracts with and act as the inside directors of the newly-merged institution, thereby foregoing other valuable opportunities that Petitioners could have pursued in the absence of Respondents' agreement.

13. Petitioners relied to their detriment upon the contractual promises of Respondents in agreeing to enter into employment contracts with the newly-merged institution, and would not have agreed to said employment contract had such promises not been made.

14. Petitioners each relied to their detriment upon the contractual promises of Respondents in agreeing to serve on the Board of Directors of the newly-merged institution, and would not have agreed to serve as directors had such promises not been made.

15. Subsequent to the merger, Petitioners initially complied with their contractual obligations and granted Horizon those forbearances and certificates that they had agreed to provide Horizon, including the recognition of Horizon's supervisory goodwill for the purpose of determining its compliance with regulatory capital requirements. In addition, Petitioners and Horizon fully performed any obligations imposed upon them by the merger agreements and the resolution of the FHLBB approving those mergers. However, in December 1989, Respondents breached their contractual obligations to Horizon and to Petitioners by refusing to recognize Horizon's supervisory goodwill, which at the time exceeded $100 million, to satisfy Horizon's regulatory capital requirements.

16. As a direct result of Respondents' breach of their Agreement with Horizon and with Petitioners, on or about January 11, 1990, Respondents rendered Horizon "insolvent" and caused Horizon to be placed into the receivership of the RTC.

17. By virtue of their breach of the contractual obligations set forth above Respondents also directly and proximately caused Horizon to breach its contractual obligations to Petitioners by terminating their employment, thereby resulting in financial losses to Petitioners well in excess of $1,000,000.00.

18. In addition, by virtue of their breach of the contractual obligations set forth above, Respondents also directly and proximately caused Horizon to breach its contractual obligations to Petitioners by terminating their contracts to serve on Horizon's Board of Directors, thereby resulting in financial losses to Petitioners well in excess of $50,000.00 each.

19. At all times, Petitioners fully performed their contractual obligations pursuant to their employment contracts.

20. At all times, Petitioners fully performed their contractual obligations as members of Horizon's Board of Directors.

21. Had it not been for Respondents' breach of their contractual obligations to Horizon and to Petitioners, Horizon would not have been declared "insolvent" and would not have been placed in receivership of the RTC. Instead, Horizon would have continued to function as a profitable and successful savings and loan institution, and Petitioners would have continued to serve as employees of Horizon and members of Horizon's Board of Directors.

WHEREFORE, Petitioners, JOHN R. GRAVEE and JEROME A. MAHER request the entry of the following relief on their behalf and against Respondents as follows:

a. An award of damages to Petitioners in excess of $50,000.00 each based upon Respondents' breach of contract for directors' fees as set forth above, plus interest, costs and fees; and

b. An award of damages in excess of $1,000,000.00 each to Gravee and Maher for loss of salary and contractual breach under their employment contracts.

c. Granting of any and all other relief the Court deems just and proper.

COUNT II
Promissory Estoppel

1 – 21. Petitioners hereby incorporate by reference paragraphs 1 through 21 of COUNT I of their claims as is fully set forth herein.

22. In order to induce Horizon and its Board of Directors, including petitioners, to approve the merger of Horizon with Glenview Guaranty, Evergreen Savings and Lincoln Square Savings, FHLBB and FSLIC promised, as set forth above, to grant Horizon certain specific forbearances and assurances for a period of not less than 5 years, and also promised that the supervisory goodwill created by virtue of the merger could be used by the newly-created institution as an asset to satisfy its capital requirements. FHLBB further promised that said supervisor goodwill could be amortized by the newly-formed institution over a period of 40 years.

23. Petitioners detrimentally relied upon each of the promises of Respondents set forth above in approving and

authorizing the merger of Horizon with Glenview Guaranty, Evergreen Savings and Lincoln Square Savings. Petitioners also detrimentally relied upon the promises of Respondents by foregoing other valuable opportunities that Petitioners could have pursued in the absence of Respondent's promises.

24. Subsequent to the merger, Respondents initially complied with the promises and granted to Horizon those forbearances and certificates that they have agreed to provide Horizon, including the recognition of Horizon's supervisory goodwill for the purpose of determining its compliance with regulatory capital requirements. However, in December 1989, Respondents breached their promises to Horizon and to Petitioners by refusing to recognize Horizon's supervisory goodwill, which at the time exceeded $100 million, to satisfy Horizon's capital regulatory requirements.

25. As a direct result of Respondents unjustified breach of its promises to Horizon and to Petitioners, on or about January 11, 1990, Respondents rendered Horizon "insolvent" and caused Horizon to be placed into the receivership of the RTC.

26. Had it not been for Respondents unjustified breach of its promises to Horizon and to Petitioners, Horizon would not have had declared "insolvent" and would not have been placed into the receivership of the RTC. Instead, Horizon would have continued to function as a profitable and successful savings and loan institution, and Petitioners likewise would have continued to serve as members of Horizon's Board of Directors and as valued employees of Horizon Bank.

27. By virtue of their breach of their promises as set forth above, Respondents directly and proximately caused Horizon to

breach its contractual obligations to Petitioners by terminating their employment contracts. As a direct result of their reliance on Respondents' promises, Petitioners have suffered losses well in excess of $1,000,000.00 each for salary benefits.

28. In addition, by virtue of their breach of their promises as set forth above, Respondents directly and proximately caused Horizon to breach its contractual obligations to Petitioners by terminating their contracts to serve on Horizon's Board of Directors. As a direct result of their reliance on Respondents' promises, Petitioners have suffered losses well in excess of $50,000.00 for Directors fees.

WHEREFORE, Petitioners, JOHN R. GRAVEE and JEROME A. MAHER request the entry of the following relief on their behalf and against Respondents as follows:

A. An award of damages to Petitioners in excess of $50,000.00 each for directors fees plus interest, costs and fees;

B. An award of damages to Petitioners in excess of $1,000,000.00 each for loss of salary and contractual breach;

C. Granting of any and all other relief the Court deems just and proper.

COUNT III
Declaratory judgment

1 – 21. Petitioners hereby incorporate by reference paragraphs 1 through 21 of COUNT 1 of their claims as if fully set forth herein.

22. In refusing to recognize the more that $100 million of supervisory goodwill that Respondents contractually agreed to allow Horizon to utilize in meeting its capital requirements, in causing Horizon to become insolvent, and then initiating this

unjustified action against Petitioners. Respondents have and will continue to cause Petitioners serious and irreparable injury to their rights and interests. A justifiable controversy exists between the parties, and, accordingly, the parties are in need of a declaration of their contractual rights and obligations. Petitioners therefore seek a declaratory judgment from this Court holding that Respondents were contractually obligated to recognize Horizon's supervisory goodwill for a period of 40 years, until the year 2002, and that in refusing to do so in December 1989 breached that contractual obligation to Petitioners, and are thus liable to Petitioners for said breach under law.

WHEREFORE, Petitioners, JOHN R. GRAVEE AND JEROME A. MAHER request the entry of the following relief on their behalf and against Respondents as follows:

A. A declaratory judgment that Respondents were contractually obligated to perform each of the obligations as set forth above, and that Respondents breached those obligations in refusing to recognize Horizon's supervisory goodwill and other forbearances, in declaring Horizon insolvent, and by initiating this actions; and

B. Granting of any and all other relief the Court deems just and proper.

COUNT IV

Breach of Contract/Severance Benefits/Gravee and Maher

1 – 21 Petitioners hereby incorporate by reference paragraphs 1 through 21 of COUNT 1 of their claim as if fully set forth herein.

22 – 28 Petitioners hereby incorporate by reference paragraphs 22 through 28 of COUNT II of their claim as if fully set forth herein.

29. Pursuant to the employment agreements dated June 23, 1987, effective January 1, 1987, as amended, between Horizon Federal Savings Bank and John R. Gravee; and Horizon Federal Savings Bank and Jerome A. Maher; Petitioners are entitled to severance benefits upon being discharged from Horizon.

30. In addition to severance benefits from Horizon, the contracts referred to in paragraph 29 aforesaid also provided for compensation for the employment of Gravee and Maher by subsidiaries of Horizon Federal Savings Bank, namely; The First Wilmette Corporation; Red Top Development Corporation; First Midwest Corporation and Horizon Financial Services Corporation.

31. By virtue of Respondents' breach of their contractual obligations to Horizon as described in paragraphs 29 and 30 aforesaid, Petitioners were terminated by the entities listed in paragraph 30 above. Said termination entitles them to the severance benefits contract for.

WHEREFORE, Petitioners, JOHN R. GRAVEE and JEROME A. MAHER request the entry of the following relief on their behalf and against Respondents as follows:

A. An award of damages to Petitioners in excess of $50,000.00 each for directors' fees, plus interest, cost and fees;

B. An award of damages to Petitioners for severance benefits, $600,000.00 to Gravee and $500,000.00 to Maher; and

C. Granting any and all other relief the Court deems proper.

COUNT V

Breach of Contract/Deferred Compensation Trust/ Intentional Interference with Contractual Relations

1-21. Petitioners hereby incorporate by reference paragraphs 1 through 21 of COUNT I of their claim as if fully set forth herein.

22-28. Petitioners hereby incorporate by reference paragraphs 22 through 28 of COUNT II of their claim as if fully set forth herein.

29. As part of the merger agreements described in paragraphs 22 and 23 above, Petitioners, Maher and Gravee gave up their vested pension rights that they had held as employees of the original institute, First Federal Savings & Loan Association of Wilmette. They gave up these rights with the understanding that they would be replaced at a later time with pension benefits from the newly-formed institution, Horizon.

30. The employment agreements between Horizon and Petitioners were renewed in 1985 and in 1987. These renewed employment agreements provided for the establishment of pension benefits for Petitioners, Gravee and

Maher, by virtue of deferred compensation trusts at first as "Rabbi" trusts before 1988, and then as "Secular" trusts in 1988.

31. The Deferred Compensation Trusts for Petitioners, Gravee and Maher were fully vested in 1987 and 1988. Harris Bank and Trust Company (hereinafter "HARRIS"), was the trustee of these trusts.

32. After the RTC's takeover of Horizon, the RTC intentionally interfered with the contractual relations between Petitioners, Gravee and Maher and the Harris Bank and Trust Company, by directing Harris not to pay out the proceeds of the trusts.

33. Petitioners, Gravee and Maher relied to their detriment upon the assurance provided at the time of the mergers that their pension rights would be reestablished by the new institution, Horizon.

34. The seizure of the Deferred Compensation Trust proceeds by the RTC was a violation of Petitioners rights under the Fifth Amendment to the United States. Constitution to just compensation for the taking of petitioners' property.

WHEREFORE, Petitioners, JOHN R. GRAVEE and JEROME A. MAHER request the entry of the following relief on their behalf and against Respondents as follows:

A. Award the Petitioners, Gravee and Maher, an amount in excess of $1,200,000.00 ($700,000.00 and $500,000.00 respectively) plus interest to compensate them for the amounts due them under the trusts, plus costs and fees;

B. An award of $1,000,000.00 as compensatory damages each and $3,000,000.00 punitive damages each for intentional interference with contractual relations;

C. Granting any and all other relief the Court deems proper.

JOHN R. GRAVEE and JEROME A. MAHER,
Petitioners

BY:
Camillo F. Volini

Camillo F. Volini
LAW OFFICES OF CAMILLO F. VOLINI
5618 North Broadway Avenue
Chicago, Illinois 60660-4414
773-275-9100

APPENDIX D

In the United States Court of Federal Claims
No. 98-61 C
Filed: January 24, 2001
(Reissued for Publication on February 7, 2001)

JEROME A. MAHER and JOHN R. GRAVEE, Plaintiffs,	)	TO BE PUBLISHED
v.	)	
THE UNITED STATES, Defendant.	)	

Camillo F. Volini, Chicago, Illinois, attorney for plaintiffs.

William G. Kanellis, with whom were Acting Assistant Attorney General David W. Ogden, Director David M. Cohen, Deputy Director Jeanne E. Davidson,Civil Division, Department of Justice, Washington, D.C., for defendant.

ORDER

GRANTING DEFENDANT'S
MOTION TO DISMISS

and

DIRECTING DISMISSAL OF
COMPLAINT

Plaintiffs are the former principal executive officers of Horizon Federal Savings Bank (the bank), a now-defunct mutual savings and loan association. Their suit, which was transferred to this court from the United States District Court for the Northern District of Illinois, seeks recovery of the employment compensation and other job-related benefits that were denied to them upon the termination of their positions by the Resolution Trust Corporation ("RTC"), acting as receiver for the bank. They allege a breach of contract by the Government.

Defendant has moved for dismissal of the suit for lack of jurisdiction or, alternatively, for failure to state a claim upon which relief can be granted. Plaintiffs oppose. The issues have been briefed and argument on the matter was heard on January 18, 2001. At the conclusion of the argument, and for reasons then explained by the court, a ruling was entered in defendant's favor. This Order formalizes that ruling and briefly restates the bases for the court's decision.

I

In early 1982, the bank (then known as First Federal Savings and Loan Association of Wilmette) entered into a series of government-sponsored supervisory mergers with three financially-troubled savings and loan associations. To facilitate these mergers, the resulting institution – renamed Horizon Federal Savings Bank – was granted certain regulatory forbearances by the banking authorities.

As the principal executive officers of the acquiring institution (First Federal), plaintiffs played a large role in the negotiations that led to the bank mergers as well as in the drafting of the various agreements between the bank and its regulators (then the Federal Home Loan Bank Board and the Federal Savings and Loan Association) establishing the regulatory framework under which the newly-formed institution would be

permitted to operate (the supervisory merger agreement). Moreover, to secure regulatory approval of the mergers, plaintiffs were required to relinquish a portion of their annual compensation – at least temporarily – in order to support the new bank in the conservation and growth of its capital.

Plaintiffs remained at the helm of the new institution until the RTC's termination of their employment in mid-1990, some six months after the bank had been declared insolvent because of its inability to satisfy the increased regulatory capital requirements imposed upon the banking industry through the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in various sections of 12 U.S.C.)

The case we have before us now draws in large part upon plaintiff's involvement in the formative events leading to the new bank's creation and upon their contribution to the business operations of that bank during the years preceding its insolvency. Plaintiffs point out that at the time the supervisory merger agreement was under discussion, federal banking authorities were made aware of their individual compensation arrangements with the bank. Indeed, a temporary reduction in the compensation owed under those arrangements was one of the requirements imposed by the authorities as a condition for approval of the merger agreement. Thus, according to plaintiffs, by subsequently agreeing to the terms of the supervisory merger agreement with the bank, regulatory authorities necessarily agreed to honor the terms of their particular compensation arrangements with the bank as well. It is on this basis then that plaintiffs now claim that they have an implied in-fact contract with the Government or, alternatively, that they are third-party beneficiaries of the bank's contract with the Government. In either case, however, their ultimate contention is that the RTC's repudiation of their employment

contracts with the bank was endorsed by the Government and thus the Government breached its commitment to honor those contracts.

II

We cannot accept this argument for lack of facts to support it. Contracts are formed through an exchange of promises – through commitments to act or refrain from acting in a specified way – that are evidenced in writing or are inferable from conduct. We have neither writing nor conduct here. Plaintiffs were not parties to the Government's supervisory merger agreement with the bank, they cite no language in that agreement supportive of the promises they now allege, and they reference no course of dealing between the parties from which the existence of such promises might reasonably be inferred. Rather, the whole of plaintiff's case rests on the naked proposition that by entering into a contract with the bank, the Government entered into a contract with them as well or, alternatively, that as part of its contract with the bank, the Government also assumed special commitments for their benefit. The argument cannot succeed.

Indeed, precisely the same argument was presented to the District Court for the Northern District of Illinois in an action brought there by the RTC against the officers and directors of the present bank alleging mismanagement of the bank's affairs. As part of their defense in that action, the outside directors raised, as a counterclaim, the contention that the RTC's termination of their positions at the bank was in violation of contractual protections afforded those positions by the bank's supervisory merger agreement with the federal regulatory authorities. The district court rejected the argument saying:

Although Outside Directors have alleged promises by FHLBB and FSLIC, those promises were indisputably made to them only in their capacity as Horizon's Board members. Indeed, the promises had to be made to the Board, for only the Board could approve the mergers. But a promise to Horizon's Board in its official capacity was nothing more than a promise to Horizon itself – plainly no promise was made to Outside Directors in their individual capacities.

To be sure, Outside Directors have alleged that the breach of the agreements with Horizon led to the termination of their positions on the Board (the only purported injuries that they can identify as individuals, as contrasted with damages to Horizon as an institution). But they have not even hinted at the existence of any of the elements of promissory estoppel as to their status as Board members (or, even more fundamentally, even as to the existence of any promise whatsoever by FHLBB or FSLIC in that respect).

FDIC v. Gravee, 966 F. Supp. 622, 632-33 (N.D. III. 1997).[1]

Plaintiffs attempt to overcome the deficiencies in their case by saying that they should be entitled to demonstrate at trial the truth of the facts they allege. However, it is not doubt about the truth of their assertions

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The claims of plaintiffs, Jerome Maher and John Gravee, that are now before this court were initially raised, by way of counterclaims, in the case cited – FDIC v. Gravee, 966 F. Supp. 622 (N.D. III. 1997). For reasons not explained in the record, the counterclaims were not adjudicated by the district court but, instead, were transferred here by order of June 23, 1997.

that defeats their claim. It is, rather, that the facts they have pled, even when taken at face value, are insufficient, as a matter of law, to make out a contract claim against the United States.

III

For the reasons stated, defendant's motion to dismiss is granted and the Clerk is directed to dismiss the complaint. Costs shall not be assessed.

John P. Wiese

Judge

Federal Rules of Appellate Procedure Rule 32(a)(7)(B)(2) Certificate of Compliance.

The undersigned hereby certifies that the brief of Appellants contains no more than 14,000 words.

_____

John O. Tuohy

APPENDIX E

United States Court of Appeals for the Federal Circuit

01-5076

JEROME A. MAHER and JOHN R. GRAVEE,
Plaintiffs – Appellants,

v.

UNITED STATES,
Defendant – Appellee.

John O. Touhy, of Chicago, Illinois, argued for plaintiffs – appellants.

William G. Kanellis, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington. DC, argued for defendant – appellee. With him on the brief were Stuart E. Schiffer, Deputy Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and Gary J. Dernelle, Trial Attorney.

Appealed from: United States Court of Federal Claims

Judge John P. Wiese

United States Court of Appeals for the Federal Circuit

01-5076

JEROME A. MAHER and JOHN R. GRAVEE,

Plaintiffs – Appellants,

v.

UNITED STATES,

Defendant – Appellee.

DECIDED: December 19, 2002

Before NEWMAN, MICHEL, and PROST, Circuit Judges.

PROST, Circuit Judge.

Jerome A. Maher ("Maher") and John R. Gravee ("Gravee") appeal from the decision of the United States Court of Federal Claims dismissing their complaint for failure to state a claim upon which relief could be granted. Maher v. United States, 48 Fed. Cl. 585 (2001). Because Maher and Gravee have failed to allege any set of facts which if true would establish privity of contract with the government, an implied-in-fact contract with the government, or that they were third-party beneficiaries of a contract with the government, we affirm.

BACKGROUND

This case is a Winstar-related case arising from the savings and loan crisis of the 1980s. See United States v. Winstar Corp., 518 U.S. 839 (1996). Maher is the former Vice President, Vice Chairman of the Board of Directors, and Chief Financial Officer of Horizon Federal Savings Bank ("Horizon"), a failed mutual savings and loan association. Gravee was Horizon's President, Chief Executive Officer, and Chairman of the Board of Directors. Horizon was formed in 1982 by the merger of First Federal Savings and Loan Association of Wilmette ("Wilmette") with three

financially-troubled savings and loan associations. In exchange for Wilmette's taking over these failing thrifts, the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings & Loan Insurance Corporation ("FSLIC") agreed, among other things, to allow Horizon to use the supervisory goodwill created by virtue of the merger as an asset to satisfy its capital requirements and to amortize the goodwill over a period of forty years.

As the directors and principal officers of Wilmette, Maher and Gravee played a large role in negotiating the terms of the merger that formed Horizon. Maher and Gravee allege that as part of these negotiations, the government required them to give up their existing pension plans from Wilmette with the understanding that Horizon could create comparable benefits for them when it became financially stable. In addition, the government allegedly required Maher and Gravee to become the directors and principal officers of Horizon. After these negotiations, Horizon was duly formed upon the execution of three merger agreements in March of 1982, followed by a vote of approval by the board of directors on November 5, 1982. In 1985, Horizon reestablished pension benefits for Maher and Gravee by creating a deferred compensation trust. Horizon established a second deferred compensation trust in 1987. The establishment of these trusts was reflected in employment and compensation agreements between Horizon and the appellants.

On August 8, 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA"). FIRREA "overhauled the structure of federal thrift regulation" by, among other things, prohibiting the use of supervisory goodwill as an asset to satisfy capital requirements. Castle v. United States, 301 F.3d 1328, 1333 (Fed. Cir. 2002) (citing Winstar, 518 U.S. at 856). Numerous thrifts, including Horizon, were unable to meet the

new requirements of FIRREA. These thrifts were seized by the Office of Thrift Supervision ("OTS") and placed into a receivership directed by the Resolution Trust Corporation ("RTC"), thus "spawn[ing] the Winstar litigation, in which the acquirors of ailing thrifts alleged that by enacting and implementing FIRREA, the government breached contracts promising thrifts particular regulatory treatment..." Castle, 301 F.3d at 1333.

The OTS declared Horizon insolvent in early 1990, placing Horizon into a receivership directed by the RTC. Maher and Gravee continued as directors and officers until June 1990, when the RTC terminated their employment. They then sought to obtain the proceeds of their deferred compensation trusts, but the RTC ordered the trustee, Harris Bank, not to disburse the trust proceeds. Maher and Gravee subsequently sued Harris Bank, Horizon, and the RTC to recover the proceeds of the deferred compensation trusts. The RTC asserted in defense that the trusts violated certain regulations and counterclaimed for recovery of bonuses paid to Maher and Gravee. After a bench trial, the United States District Court for the Northern District of Illinois ruled in the RTC's favor, finding that the trusts violated 12 C.F.R. § 563.39-1 (1987) and that the bonuses violated 12 C.F.R. § 563.39 (1987). Maher v. Harris Trust & Sav. Bank, No. 90-C-5118, 1994 U.S. Dist. LEXIS 17284 (N.D. III. Nov. 23, 1994). The United States Court of Appeals for the Seventh Circuit affirmed, noting that while plaintiffs may have vested contractual rights to their deferred compensation, "the property interests plaintiffs acquired as a result of the trusts are void and...the trust assets will be shared by all persons with proper claims against Horizon." Maher v. Harris Trust & Sav. Bank, 75 F.3d 1182, 1191 (7th Cir. 1996).

While Maher and Gravee's appeal was pending at the Seventh Circuit, the RTC sued all of the directors of Horizon, including Maher and Gravee, for breach of fiduciary duty, breach of contract,

negligence, and gross negligence in the operation of Horizon leading to losses in excess of $50 million. The "outside directors" (all of Horizon's former directors but for Maher and Gravee, who were "inside directors" because they were the only directors employed by Horizon) counterclaimed for breach of contract and brought a third-party complaint against the OTS in its capacity as successor to the FHLBB, and against the Federal Deposit Insurance Corporation ("FDIC") in its capacity as successor to the FSLIC. Maher and Gravee filed a separate answer to the RTC's complaint, along with counterclaims against the RTC, OTS, and FDIC. On June 23, 1997, pursuant to a settlement agreement, the district court dismissed the pleadings involving the outside directors and, at the same time, transferred the counterclaims of Maher and Gravee to the Court of Federal Claims. Maher and Gravee then filed an Amended Complaint at the Court of Federal Claims on February 26, 1998, naming the United States as a defendant, acting through the RTC, OTS, and FDIC.

The government moved to dismiss the Amended Complaint, arguing that the claims were time barred, the transfer was improper, the court lacked subject matter jurisdiction, and Maher and Gravee failed to plead a claim for which relief could be granted. The Court of Federal Claims granted the motion to dismiss, stating:

> Contracts are formed through an exchange of promises – through commitments to act or refrain from acting in a specified way – that are evidenced in writing or are inferable from conduct. We have neither writing nor conduct here. Plaintiffs were not parties to the Government's supervisory merger agreement with the bank, they cite no language in that agreement supportive of the promises they now allege, and they reference no course of dealing

> between the parties from which the existence of such promises might reasonably be inferred. Rather, the whole of plaintiff's case rests on the naked proposition that, by entering into a contract with the bank, the Government entered into a contract with them as well or, alternatively, that as part of its contract with the bank, the Government also assumed special commitments for their benefit. The argument cannot succeed.

Maher, 48 Fed. Cl. at 586.

Maher and Gravee appeal the dismissal of their complaint. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review "de novo whether the Court of Federal Claims possessed jurisdiction and whether the Court of Federal Claims properly dismissed for failure to state a claim upon which relief can be granted, as both are questions of law." First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1256-87 (Fed. Cir. 1999) (quoting Wheeler v. United States, 11 F.3d 156, 158 (Fed. Cir. 1993)).

"A motion to dismiss for failure to state a claim upon which relief can be granted is appropriate where the plaintiff cannot assert a set of facts which would support its claim." Mitchell Arms, Inc. v. United States, 7 F.3d 212, 215 (Fed. Cir. 1993). In its analysis, this court "accept[s] the plaintiff's factual allegations in the complaint as true, drawing all inferences in favor of the plaintiff." Ponder v. United States, 117 F.3d 549, 552 (Fed. Cir. 1997).

According to Maher and Gravee, the gravamen of their...complaint is that the government acting under and through its agencies, whether it be

the OTS, the RTC or FDIC, breached its contractual obligations to Horizon and thus to Maher and Gravee by changing the regulatory framework under which the government had initially induced Horizon to merge with several failed thrift institutions in the early 1980s.

Maher and Gravee state that their claim "can be characterized as promissory estoppel, it can be characterized as third-party beneficiary contract, it can be characterized as direct contract, it can be characterized as implied-in-fact contract, induced reliance or whatever." Notwithstanding appellant's nebulous characterization of their case, we understand the Amended Complaint and the parties' arguments as raising two distinct issues: whether Maher and Gravee are third-party beneficiaries of a contract between Horizon and the government and whether they have an implied-in-fact contract with the government.[2]

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[1] The parties also debate whether Maher and Gravee have privity of contract with the government. See Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984) (stating that "the government consents to be sued only by those with whom it has privity of contract"). Maher and Gravee can establish privity of contract through an implied-in-fact contract with the United States, or by establishing that they are intended third-party beneficiaries of a contract with the United States. See First Hartford Corp., 194 F.3d at 1289. Thus, whether Maher and Gravee have privity of contract with the government turns on our resolution of the implied-in-fact contract and third-party beneficiary issues. In addition, the government makes the alternative argument that the Amended Complaint is barred by the statute of limitations. We note that the Court of Federal Claims did not reach this issue and, in light of our disposition in this case, neither do we.

The starting point for our analysis is the Supreme Court's holding in Winstar: "Although Congress subsequently changed the relevant law [by enacting FIRREA], and thereby barred the Government from specifically honoring its agreements, we hold that the terms assigning the risk of regulatory change to the Government are enforceable, and that the Government is therefore liable in damages for breach." Winstar, 518 U.S. at 843. The Winstar case thus recognized a contract between the government and certain failed thrifts based on the government's promise to provide certain regulatory forbearances.

Maher and Gravee claim that they are the intended third-party beneficiaries of such a contract between the government and Horizon. Specifically, the Amended Complaint alleges that:

> Petitioners each were intended beneficiaries of Respondents' contractual agreement with Horizon to recognize Horizon's supervisory, goodwill for a period of 40 years...[I]n December 1989, Respondents breached their contractual obligations to Horizon and to Petitioners by refusing to recognize Horizon's supervisory goodwill, which at the time exceeded $100 million, to satisfy Horizon's capital requirements.

According to the Amended Complaint, the government's breach caused Horizon to become insolvent, which also "directly and proximately caused Horizon to breach its contractual obligations to Petitioners by terminating their employment." On appeal, Maher and Gravee argue that they are intended third-party beneficiaries of the merger agreement because the government intended for the merger to provide certain benefits to Maher and Gravee, such as their employment as directors and officers, in

order to induce them to agree to the merger. They also argue that the government required them to give up their existing pension plans with Wilmette as a prerequisite to the merger, with the understanding that Horizon could reestablish comparable plans once it was financially stable.

Even accepting these allegations as true, Maher and Gravee do not meet the definition established by this court's precedent for intended third-party beneficiaries. Two recent opinions from this court address the issue of who qualifies as a third-party beneficiary of a Winstar-type agreement between the government and a failed savings and loan. Castle, 301 F.3d at 1337-39; Glass v. United States, 258 F.3d 1349, 1353-55 (Fed. Cir. 2001), amended on reh'g, 273 F.3d 1072 (Fed. Cir. 2001). In Glass, the principal stockholders of Sentry Mortgage Corporation ("Sentry") agreed to purchase a financially troubled thrift, Security Savings, in exchange for favorable regulatory treatment from the FHLBB and FSLIC, including allowing Security Savings to use supervisory goodwill as an asset to meet its regulatory capital requirements. Glass, 258 F.3d at 1352. After the enactment of FIRREA, Security Savings became insolvent and was liquidated by the RTC. The former shareholders of Security Savings claimed that the government breached its agreement to allow Security Savings to amortize supervisory goodwill over a period of twenty-five years. According to the shareholders, they were third-party beneficiaries of this agreement because the government knew that the shareholders were the true parties in interest. Similar to the arguments made by Maher and Gravee, the shareholders argued that the government induced them into agreeing to the merger by promising regulatory forbearances. Id. at 1354. We held that the shareholders were not third-party beneficiaries of any contract between the FSLIC and FHLBB on the one hand, and Security and Sentry on the other. Id. In particular, we stated:

> In order to prove third[-]party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly. Third[-]party beneficiary status is an "exceptional privilege" and, to avail oneself of this exceptional privilege, a party must "at least show that [the contract] was intended for his direct benefit."

Id. (quoting German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 230, (1912)). Because the shareholders did not stand to benefit directly under the contract, we found that they were, at most, incidental beneficiaries of the contract. Id. at 1355.

In Castle v. United States, two individuals, Castle and Harlan, owned a merchant banking firm that merged with Western Empire, a financially-troubled thrift. 301 F.3d at 1333-34. According to Castle and Harlan, "they agreed to acquire and recapitalize Western Empire, and...in exchange, the Bank Board and FSLIC promised to afford Western Empire special regulatory treatment." Id. at 1334. Castle and Harlan personally contributed $500,000 to the recapitalization of Western Empire; other shareholders contributed an additional $14.6 million. After the enactment of FIRREA, Western Empire was placed into receivership for failure to comply with the new capital maintenance requirements. Id. at 1335. The shareholders then sued the government, alleging that the passage of FIRREA caused a breach of contract and Fifth Amendment taking of property. We concluded that only Castle and Harlan had standing to sue for breach of contract because only they signed any document constituting an alleged contract. Id. at 1337. The remaining shareholders did not have standing to sue and were not intended third-party beneficiaries "because

their sole benefit under the alleged contract was in their capacity as shareholders of Western Empire." Id. "Nothing suggest[ed] that the government made any promises, contractual or otherwise, that were expressly intended to benefit the shareholders personally, independently of their status as shareholders of Western Empire." Id. We also concluded that the enactment of FIRREA did not constitute a taking under the Fifth Amendment. Id. at 1341-42.

Based on the holdings of Castle and Glass, it is clear that Maher and Gravee are not intended third-party beneficiaries of the merger agreement. Maher and Gravee have not pled any facts suggesting that the merger agreement was entered into for the purpose of benefiting them directly. Nor have they pled or established that the government took on any obligations in the merger agreement for their personal benefit, or even that the merger agreement contains any provisions pertaining to them personally. Rather, from what we can discern from the parties' briefs and the record before us, any promises the government may have made to Maher and Gravee regarding their continued employment and replacement of pension benefits were allegedly made during negotiations for the merger; such promises are not found in the merger agreement itself. To the extent Maher and Gravee had certain expectations from these negotiations regarding their employment and pension benefits, these expectations are reflected in their employment agreements with Horizon, not the merger agreement. Granted, the merger agreement may have been a necessary instrument for Maher and Gravee to become directors of Horizon – because without the merger agreement Horizon would not exist – but at best, this would make Maher and Gravee "incidental beneficiaries of the contract with no rights to enforce the contract against the United States." Glass, 258 F.3d at 1355; Restatement (Second) of Contracts § 302(2). ("An

incidental beneficiary is a beneficiary who is not an intended beneficiary.").

In short, Maher and Gravee have not shown that the merger agreement "reflects an intention to benefit [them] directly." Glass, 258 F.3d at 1354. We therefore conclude that Maher and Gravee have not pled, and could not plead, sufficient facts to establish that they are intended third-party beneficiaries of a contract between Horizon and the government.

II

Maher and Gravee also argue that they have an implied-in-fact contract with the government by virtue of promises they were given "directly by the Federal Government which were relied upon at the beginning of the merger talks and throughout the entire continued administration and management of [Horizon] up until the time of the takeover by the RTC." According to Maher and Gravee, the government promised (and even required) that they would be the directors of Horizon, and that they must give up their existing pension plans from Wilmette with the understanding that Horizon would later establish comparable plans once it was financially stable.

An implied-in-fact contract is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." Hercules, Inc. v. United States, 516 U.S. 417, 424 (1996) (quoting Balt. & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923)). While an implied-in-fact contract may be inferred from the parties' conduct, the required elements for contract formation – "a mutual intent to contract including an offer, an acceptance, and consideration" – are the same for express and implied-in-fact contracts. Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir.

1997). In addition, when trying to establish an implied-in-fact contract with the government, the complaint must allege that the government's representative had the authority to enter into the alleged contract. Cf. Sommers Oil Co. v. United States, 241 F.3d 1375, 1380 (Fed. Cir. 2001) (finding that it "was sufficient for the complaint to allege that the government's promise was authorized by a person having legal authority to do so").

Nothing indicates that the government promised, or even could have promised, to provide Maher and Gravee with employment and pension benefits. Instead Horizon, not the government, was responsible for employing Maher and Gravee and creating their new pension plans, which were in the form of deferred compensation trusts. Thus, any promises of employment and pension benefits arose directly from Maher and Gravee's employment contracts with Horizon, not through an implied-in-fact contract with the government[3] Moreover, the Amended Complaint fails to plead the requisite elements of a contract with the government for employment and pension benefits. The government's alleged promises identified in the Amended Complaint instead relate only to the regulatory treatment of Horizon, as does any alleged breach. According to the Amended Complaint, "[b]y virtue of [the government's] breach of their promises as set forth above [regarding certain regulatory treatment]. Respondents also directly and proximately caused Horizon to breach its contractual obligations to petitioners by terminating their employment, thereby resulting in financial losses to Petitioners well in excess of $1,000,000" (emphasis added). Thus, the Amended Complaint makes clear that Horizon, not the government, allegedly contracted with Maher and Gravee to provide employment and pension benefits. We conclude that the

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[2] To the extent Maher and Gravee have a claim for breach of their employment contracts, including a claim for payment of the proceeds of the deferred compensation trust, established for them by Horizon, such a claim would be directly against Horizon through its receiver, not indirectly through the government. Maher and Gravee made a failed attempt at such a claim more than ten years ago when they sued Harris Bank, Horizon, and the RTC. See Maher, 75 F.3d at 1187, 1190-91. Moreover, under FIRREA, persons having claims against the assets of a thrift are subject to the administrative claims review process prescribed by 12 U.S.C. § 1821(d). The government argues that Maher and Gravee have failed to timely follow these procedures; Maher and Gravee argue otherwise. This issue is not framed by the Amended Complaint and is not properly before us on appeal.

Amended Complaint fails to allege facts that, if proven, would establish that Maher and Gravee had an implied-in-fact contract with the government for these same benefits.

CONCLUSION

The Amended Complaint in this case does not establish a cause of action against the government for Maher and Gravee's termination of employment by Horizon or for payment of the proceeds of the deferred compensation trusts. Maher and Gravee have not pled sufficient facts to establish that they are intended third-party beneficiaries of the merger agreement between the government and Horizon, or that they have an implied-in-fact contract with the government for employment and pension benefits. We therefore affirm the Court of Federal Claims' dismissal of the Amended Complaint.

AFFIRMED